No. 22693

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES NATIONAL BANK OF OREGON, PORTLAND, OREGON,

Appellant,

v.

ASOCIACION de AZUCAREROS de GUATEMALA 4a. Av. 14-53(1) GUATEMALA CITY, GUATEMALA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE ROBERT C. BELLONI, Judge

CLARENCE R. WICKS
HOWARD M. FEUERSTEIN
ROBERT D. GEDDES
DAVIES, BIGGS, STRAYER, STOEL AND BOLEY
1410 Yeon Building, Portland, Oregon
Attorneys for Appellant

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-68

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The jurisdiction of the United States District Court to hear this case was based upon 28 U.S.C. 1332 (a) (2), plaintiff-appellee being a citizen of Guatemala, all of the defendants being citizens of the State of Oregon, and the amount in controversy exceeding

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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court to hear this case was based upon 28 U.S.C. 1332 (a) (2), plaintiff-appellee being a citizen of Guatemala, all of the defendants being citizens of the State of Oregon, and the amount in controversy exceeding

the sum of $10,000 (R. 69). The jurisdiction of this court to review the District Court's judgment is based upon 28 U.S.C. 1291.

STATEMENT OF CASE

Appellee, Asociacion de Azucareros (Association), commenced this action against Phillip S. Greenberg (Greenberg) and PSG Co. (PSG) to recover damages upon a series of claims, including alleged defaults in payments claimed due under a contract for the sale of sugar, dated May 20, 1966 (hereafter GARDENIA sugar and GARDENIA contract). PSG asserted four counterclaims against the Association, seeking damages for breach of three contracts (including the GARDENIA contract) and for wrongfully inducing an Association member to breach contracts with PSG (R. 69, 70). As a corollary to its action against PSG and Greenberg the Association also sought recovery against appellant, United States National Bank of Oregon (Bank), for amounts alleged to be payable under a letter of credit securing Greenberg's and PSG's obligation under the GARDENIA contract.

The issues between the Association and the Bank were segregated and tried first, resulting in judgment against the Bank in the amount of $250,135.25 (R. 113). The issues between the Association and PSG and Greenberg were later compromised (R. 102).

The Bank's involvement herein grows out of the letter of credit arrangement devised by the Associa-

tion and PSG for payment of the purchase price of the GARDENIA sugar. Under the terms of the GARDENIA contract and an earlier master contract dated June 22, 1965, payment for sugar sold to PSG was to be effected under irrevocable letters of credit for 95 percent of the value of any shipment. Payment of the final five percent was to be made following final commercial liquidation of the shipment by PSG (Exs. 1 and 18; R. 70, Par. 1). The GARDENIA agreement provided for the sale to PSG of approximately 10,500 long tons bulk centrifugal raw sugar polarizing at 96° (Ex. 18; R. 70, 71, Par. 2). Pursuant to the payment arrangement established between PSG and the Association, the Bank issued its irrevocable letter of credit No. 11561 to the Association for the account of PSG. The letter of credit provided for drafts to be drawn at sight for 95 percent of full invoice value, accompanied by documents evidencing shipment of 5,000 long tons Guatemala bulk raw centrifugal sugar, 1965-66 crop, basis 96° minimum polarization (R. 71, Par. 4). This was a back-to-back letter of credit transaction in that PSG was the beneficiary of a letter of credit issued by J. Henry Schroder Banking Corp. to secure the resale of the sugar to a New York buyer (R. 72, Par. 8).

Subsequent amendments to the credit nominated the GARDENIA as the vessel to transport the sugar and provided for two separate drafts against the credit; the first to cover the portion of the sugar eligible for immediate admission into the United States, and the second to cover sugar not yet eligible for entry under

the United States sugar quota system (R. 71, 72, Par. 5). Payment on the second draft was authorized only when the sugar became eligible for admission, and was subject to "deductions by United States National Bank of all charges incurred prior to obtaining admission of the sugar to the United States" (R. 72, Par. 5). The credit was also amended to reduce the first draft to 90 percent of invoice value, or $335,198.30 (Tr. 243, 244). None of the preceding amendments are in controversy in the instant appeal.

On or about August 22, 1966, the Bank received the shipping documents which were to support the first draft under the letter of credit (R. 72, Par. 7). It was immediately apparent to the Bank that the documents failed to comply with the requirements of the credit in several particulars, including the failure of the commercial invoice to specify the polarization of the sugar (Tr. 79, 83). At the same time, however, Greenberg informed the Bank that the sugar itself failed to meet the 96° minimum polarization requirement established in the credit (Tr. 82). Greenberg also informed the Association of the deficiencies in the polarization of the sugar, and the Association agreed with Greenberg to a reduction of the first draft to 75 percent of invoice value, which would be $279,331.92 (Tr. 208-214).

At the time of the negotiations in question the available tests indicated that the sugar was polarizing as much as 2.7° below the 96° minimum established in the GARDENIA contract and in the credit (Ex.

224). In fact, the sugar never did reach the 96° minimum. Final test results established that the average polarization of the GARDENIA sugar was 95.176358 (Ex. 223). Although the Bank received payment on behalf of PSG under the Schroder credit, it was understood that PSG might have to make subsequent adjustments with the New York buyer to compensate for deficiencies in the quality of the GARDENIA sugar (Tr. 98). At Greenberg's request and to obtain approval of proposed reduction by the Association and its bank, the Bank sent the following cable to Banco del Agro, S. A., the Association's bank in Guatamala (Tr. 84, 95):

> "174 REFERENCE OUR LETTER CREDIT 11561 POLARIZATION BELOW CREDIT REQUIREMENT ASAZGUA [the Association] WILL AUTHORIZE DRAFT COVERING 2917 LONG TONS AT 75 PERCENT INVOICE VALUE PLEASE OBTAIN THEIR APPROVAL AND CABLE US URGENTLY TODAY NECESSARY AUTHORITY TO ALTER DRAFT TO 75 PERCENT INVOICE VALUE ADVISE US CORRECTED DRAFT AMOUNT. UNITBANK." (Ex. 54)

The Association received the cable through its bank and accepted it as confirmation of Greenberg's representations regarding the commodity (Tr. 224, 225). By cable dated August 28, 1966 and by letter dated August 31, 1966, Banco del Agro, S.A. confirmed on behalf of the Association the reduction of the first draft to 75 percent of invoice value (Exs. 212, 58). The trial court found that the cable constituted

a false representation as to the quality of the sugar, that the Bank either knew or should have known that it was false, and that the Association relied upon the representation of the Bank that the sugar was of low polarization (R. 107, paras. 10, 13). On the basis of these findings the trial court held the Bank liable for the difference between 75 percent invoice value and 90 percent invoice value, or $55,866.38, plus interest. The Bank has assigned these findings as error.

The second draft against the letter of credit was also reduced to 75 percent of invoice value, and substantial deductions were made from that draft for alleged charges for procuring admission of the sugar into the United States (R. 73, 74, paras. 13, 14). The trial court again found that the Bank's cables requesting confirmation of proposed amendments of the second draft constituted representations as to the quality of the sugar and not as to the compliance of the documents, that such representations were false, and further that the Association had never accepted the amendment but had only made a counterproposal (R. 108, par. 16). The finding that the Association never accepted the amendment of the second draft is not contested in this appeal.

After the court rendered its decision from the Bench, and before judgment was entered against the Bank, the Association, Greenberg, and PSG entered into an agreement of release and satisfaction (R. 124). Pursuant to the terms of that agreement, reproduced as Appendix B to this brief, the Association released

all its claims against Greenberg and PSG, totalling approximately $899,000, including its $258,954 claim for the unpaid purchase price of the GARDENIA sugar. In return, PSG and Greenberg released claims against the Association, totalling approximately $1,265,000. The Bank did not consent to the release and satisfaction (R. 125) nor was there any attempt to reserve the Association's claims against the Bank in that document. On discovery of the release and satisfaction, the Bank moved the court to amend its Findings of Fact, Conclusions of Law and Judgment to show that any debt which the Bank formerly owed the plaintiff was satisfied. In the alternative, the Bank moved to be relieved of the judgment entered against it on the ground that the judgment had been discharged (R. 117-127). The Bank's motion was denied by the court on November 29, 1967, without opinion (R. 135-136), and the Bank has assigned denial of this motion as error.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Does a letter of credit transaction in which both the issuing bank and the buyer are obligated to the seller, and the issuing bank has a right of reimbursement from the buyer, constitute a suretyship relation in the broad sense?

2. Where a seller in a letter of credit transaction gives the buyer a full release from his obligation to pay for the commodity and the seller in the release

fails to reserve his rights against the issuing bank, is the issuing bank discharged from its obligation to honor drafts drawn under the letter of credit?

3. Where the seller in a letter of credit transaction gives a full release to the buyer, but fails to expressly reserve his rights against the issuing bank, is the discharge of the issuing bank prevented by the fact that the seller had assumed that he would still have a right to proceed against the issuing bank?

4. Is the seller in a letter of credit transaction entitled to only one recovery of the purchase price of the commodity?

5. Where the seller in a letter of credit transaction enters into a mutual release with the buyer in which the seller releases the buyer from his obligation to pay for the commodity in return for the buyer's release of the seller from claims in excess of the purchase price, must the agreed satisfaction of the purchase price be taken in mitigation of the seller's damages resulting from the issuing bank's failure to honor the letter of credit?

6. Where a letter of credit requires documents evidencing shipment of sugar "basis 96° minimum polarization" could the issuing bank properly use the phrase "polarization below credit requirement," to inform the beneficiary that the sugar was not polarizing at the level specified in the letter of credit?

7. Can the beneficiary of a letter of credit avoid its prior reduction of a draft against the credit for

misrepresentation where the representation relied upon was in fact true but the beneficiary construed it incorrectly?

SPECIFICATION OF ERRORS

1. The trial court erred in failing to grant the Bank's post-trial motion which was based upon the ground that the Bank's obligation to the Association was discharged or satisfied by the Association's release of PSG and Greenberg from any liability for the purchase price of the sugar, in return for PSG's and Greenberg's release of their claims against the Association.

2. The trial court erred in finding that the Bank's August 26, 1966 cable to the Association constituted a misrepresentation vitiating the Association's consent to the reduction of the first draft. Accordingly the court erred in finding the Bank liable to the Association on the first draft in the amount of $55,-866.38.

SUMMARY OF ARGUMENT

1. The Association's release of PSG and Greenberg from liability for the purchase price of the GARDENIA sugar, without an express reservation of rights against the Bank, discharged the Bank from any liability under the letter of credit securing that sale. The parties to a letter of credit transaction are in a suretyship relation in the broad sense. Both the

issuing bank and the buyer are obligated to the seller, who is entitled to but one payment for his goods; as between the issuing bank and the buyer, the ultimate burden of paying for the goods will fall on the buyer because of the bank's right of reimbursement. Thus, the issuing bank is the surety, and the buyer is the principal. Under the law of suretyship, the seller's release of the buyer, without reservation of his rights against the bank, as surety, constitutes a discharge of the bank. The mere fact that the seller did not intend to discharge the bank does not prevent the discharge unless a reservation of rights is expressly included in the instrument of release.

Even in the absence of a suretyship relation, the mutual releases constituted an agreed satisfaction of the purchase price of the sugar and must be taken in mitigation of the Association's damages resulting from any breach of the letter of credit by the Bank. The Association is entitled to but one payment of the purchase price of the sugar, and its damages against the Bank are mitigated by whatever the Association realizes from the sale or disposition of the sugar. The Association, having accepted PSG's and Greenberg's release of their counterclaims as an agreed satisfaction for its claim against them for the purchase price of the sugar, may not now seek additional satisfaction from the Bank. The Association has mitigated its damages.

2. The letter of credit in controversy specified documentation evidencing shipment of sugar

"basis 96° minimum polarization." The letter of credit itself, related documents and the parties used "credit" and "letter of credit" interchangeably. The controlling law as contained in the Uniform Commercial Code also uses the terms as equivalents. In this context the cable advising the Association

> "REFERENCE OUR LETTER CREDIT 11561 POLARIZATION BELOW CREDIT REQUIREMENT"

was equivalent to advice that the sugar did not polarize at the 96° minimum specified in the letter of credit.

The Association cannot avoid its reduction of the first draft on the basis of misrepresentation where all of the evidence offered on trial conclusively establishes the sugar polarized below 96°. There is no basis in the letter of credit transaction or elsewhere in the relationship of the parties to justify the Association's belief that the cable represented the sugar as polarizing below 94°. Such misinterpretation constitutes a unilateral mistake on the Association's part, and it cannot avoid the reduction of its draft where the Bank has materially changed its position.

ARGUMENT

I

The Association's release of PSG and Greenberg from any liability for the purchase price of the sugar, in return for PSG's and Greenberg's release of their claims against the Association, discharged or satisfied the Bank's obligation to the Association based upon the letter of credit.

Within ten days of the trial court's entry of its judgment in favor of the Association (R. 113), the Bank filed its motion under Rules 52(b), 59(a), 59(e) or 60(b)(5) and (6) of the Federal Rules of Civil Procedure (R. 117). The applicable provisions of the Federal Rules of Civil Procedure are set forth in Appendix C of this brief. The motion requested that the trial court amend its findings of fact and conclusions of law and its judgment in order to show that any obligation of the Bank to the Association had been satisfied or discharged (R. 117-18, paras. 1, 2). In the alternative, the Bank sought to be discharged from the judgment upon the same grounds (R. 118, par. 3).

The motion and accompanying affidavits recited that in this action the Association was asserting a claim against the Bank for $252,247.79 based upon the Bank's refusal to pay drafts drawn under the letter of credit which was issued to secure the GARDENIA shipment. The Association had also asserted a claim against PSG and Greenberg for $258,954.75, representing the unpaid purchase price of the GARDENIA sugar (R. 118, par. 4(a); R. 75, paras. 3, 4).

The Association had asserted other claims against PSG and Greenberg totalling approximately $639,813 (R. 119, par. 4(b); R. 75-76).

PSG had admitted that it owed the Association $244,730.30 on the purchase price of the GARDENIA sugar (R. 119, par. 4(b); R. 74, par. 15), but PSG and Greenberg had asserted setoffs and counterclaims against the Association totalling approximately $1,265,423 (R. 119, par. 4(b); R. 77-79). The parties had agreed that the Association's claim against the Bank would be tried first, to be followed by the trial of the issues between the Association and PSG and Greenberg (R. 153).

The motion and affidavits recite that, after the trial court had made its oral findings on October 27, 1967 against the Bank, the Association and PSG and Greenberg entered into a "Full and Final Release of All Claims" against each other (R. 119, par. 4(c); R. 122-24). The release (R. 124) is set out in full in Appendix B of this brief. In the mutual release the Association released and discharged PSG and Greenberg from all claims against them, including the claim for the purchase price of the GARDENIA sugar. PSG and Greenberg released and discharged the Association from all claims against it, but reserved their rights as against one of the members of the Association, El Salto, S.A. The Association, however, did not reserve any rights against the Bank in the release. On the following Monday, October 30, the Association and PSG and Greenberg filed a stipulation and

order of dismissal with prejudice of all claims and counterclaims between them, again without a reservation of rights against the Bank (R. 102).

Although the attorneys for the Bank knew during the trial that the Association and PSG and Greenberg were contemplating a settlement of the claims between them other than the claim on the GARDENIA shipment (R. 129-30), neither the Bank nor its attorneys knew until after judgment was entered against the Bank that such settlement would be in the form of a mutual release which would include a release of the Association's claim against PSG and Greenberg for the purchase price of the GARDENIA sugar (R. 119, par. 4(c); R. 125-26). Having no knowledge of the Association's intended release of PSG and Greenberg from the GARDENIA claim, the Bank, of course, could not and did not consent to this release.

The Association filed a counter-affidavit to the motion in which it contended that it had not intended to release the Bank and that the only reason it entered into the release was because the Association would be unable to collect any judgment against Greenberg and PSG due to their insolvency (R. 128-31). The affidavit is silent with respect to the counterclaims against the Association, which were discharged by virtue of the mutual release.

The trial court heard oral argument on the motion, after which it denied the motion without evidenciary hearing, findings or opinion (R. 154, 135).

A. The Association's release of PSG and Greenberg from liability for the purchase price of the sugar, without an express reservation of rights against the Bank, discharged the Bank from any liability under the letter of cerdit.

1. *The relationship of the parties to a letter of credit transaction is a suretyship relation in the broad sense.*

In order to determine the effect on the Bank of the Association's release of PSG and Greenberg from any further liability to pay for the GARDENIA sugar, it is necessary to define the legal relationship of the parties. In a letter of credit transaction such as the present one, the buyer agrees to pay the seller the purchase price of the goods. At the buyer's request, the issuing bank through its letter of credit agrees to pay the seller a portion or all of the purchase price upon presentment of specified documents. The buyer in turn agrees to reimburse the issuing bank for any sums paid the seller under the letter of credit. Often, as in the instant case, the buyer is not required to pay the bank until the bank has paid the seller under the letter of credit (Ex. 202).

The net result is that the seller is the recipient of two separate promises to pay. From the seller's viewpoint, the principal debtor or the debtor to which the seller will first look is the issuing bank. The reason the seller looks to the bank first, of course, is that if the documents are in order the letter of credit calls for prompt payment. Should the issuing bank fail to make payment under the letter of credit, however,

the seller may nevertheless fall back to the contract of sale and pursue the buyer. Note, 40 Harv. L. Rev. 294 (1926). As between the issuing bank and the buyer, the ultimate liability must eventually rest with the buyer.

There can be no doubt that a letter of credit involves a suretyship relation as that term is used in the Restatement of the Law of Security. Section 82 of the Restatement defines "suretyship" as follows:

> "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." Restatement, Security § 82, at 228 (1941).

The above definition is broadly descriptive of the fact situation to which the rules of the Restatement apply.[1] Restatement, Security § 82, comment a, at 229 (1941).

A letter of credit transaction falls within the general definition of suretyship. Both the buyer and the issuing bank are under an obligation to the seller—the buyer through the contract of sale and the bank through the letter of credit. The mere fact that the ob-

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[1] The Restatement notes that in some jurisdictions "suretyship" is used as a general term and "guaranty" is used to denote some particular type of surety contract. Other states, however, use "guaranty" as the general term and "suretyship" as the restricted term. Restatement, Security § 82, comment g, at 231-32 (1941). For purposes of the Restatement and this brief, "suretyship" is used as the general term.

ligations are contained in separate instruments or that the duties of the buyer and the bank are not co-extensive does not defeat the suretyship relation. Restatement, Security § 83(a) (1941); *id.* at § 82, comment f.

The seller is entitled to but one performance. He may not collect on the letter of credit and then seek the full purchase price from the buyer. Likewise, if the seller collects the purchase price from the buyer, the bank's obligation under the letter of credit is reduced. The principle that the seller is entitled to be paid for his product only once is codified in the Uniform Commercial Code, ORS 75.1150(1), which provides that the seller's damages against an issuer of a letter of credit must be reduced by any amount the seller realizes from the disposition of the goods. This was also the rule under pre-Code law. *Maurice O'Meara Co.* v. *National Park Bank*, 239 N.Y. 386, 146 N.E. 636, 640 (1925); 6 Michie, Banks and Banking 393 (1952).

As between the two promissors, it is essential that one of them, defined as the "principal," must bear the ultimate burden. The "surety" is the promissor who is entitled to be relieved by the principal. That the creditor may first look to the surety as being the primary obligor is of no consequence if the surety is entitled to pass the burden on to the other party:

> "When the statement is made that the principal should perform, or that the principal has the principal or primary duty and the surety an accessorial or a secondary duty, it does not mean

> that the creditor's assertion of his right against the surety must be postponed until some action is taken against the principal. So far as the creditor is concerned, the surety may be the primary obligor.
>
> * * * * *
>
> "The one who should perform, the one who has the principal or primary obligation, in suretyship, is the one who, considering the situation as a whole, has the ultimate liability, or who would have the ultimate liability were it not for some defense, such as infancy, which is personal to himself." Restatement, Security § 82, comment f, at 229-30 (1941).

Thus, even though the seller first looks to the issuing bank for payment under the letter of credit, the bank is the surety and the buyer the principal because of the bank's right of reimbursement from the buyer.[2]

The authorities have recognized the suretyship element in a letter of credit transaction in which the seller has a right against both the issuing bank and the buyer, and the buyer has yet to pay the issuer the purchase price. Professor McCurdy has stated:

> "If, however, the seller has a right to proceed against the buyer for the purchase price of the goods, there is between the bank and the buyer suretyship in its broad sense. Both are liable for the same debt. As between the buyer and the issuing bank the buyer should ultimately pay. The

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[2] The contrary would be true where the buyer pays the purchase price to the bank prior to its issuance of the letter of credit, since the bank then does not have a right of reimbursement from the buyer.

bank is therefore principal, and the issuing bank is surety. But when the buyer pays the purchase price to the issuing bank the bank becomes principal and the buyer is surety. That the bank is not a guarantor, or surety in the narrow sense, is clear. Its obligation is primary and not secondary, even though the word *guaranty* is used." McCurdy, *Commercial Letters of Credit*, 35 Harv. L. Rev. 715, 737-38 (1922).

In *American Nat. Bank & Trust Co.* v. *Banco Nacional de Nicaragua*, 231 Ala. 600, 166 So. 8, 13 (1936), the court noted that a letter of credit is a written proposal to stand as surety or guarantor for the person named in the letter. In *Dunn* v. *McCoy*, 113 F.2d 587, 588-89 (3d Cir. 1940), the Third Circuit observed that letters of credit "are in essence only guaranties." In *Marshall-Wells Co.* v. *Tenney*, 118 Or. 373, 244 Pac. 84 (1926), the Oregon Supreme Court applied suretyship law to a nondocumentary letter of credit. See also *Timberlake* v. *J. R. Watkins Co.*, 209 N.E.2d 909 (Ind. App. Ct. 1965).

In the present case, since the Bank acted as surety and PSG as principal, the effect of the Association's release of PSG must be determined according to the law of suretyship.

2. *Under the law of suretyship, where the creditor releases the principal, the surety is discharged unless the surety consents to remain liable notwithstanding the release or unless the creditor in the release reserves his rights against the surety.*

Section 122 of the Restatement of the Law of Security states the law with respect to a creditor's release of a principal:

> "Where the creditor releases a principal, the surety is discharged, unless
>
> (a) the surety consents to remain liable notwithstanding the release, or
>
> (b) the creditor in the release reserves his rights against the surety."

To permit the creditor to proceed against the surety after having given the principal a complete release of the underlying obligation would defeat the purpose of the release, since the surety would then seek reimbursement from the principal. Moreover, the creditor is entitled to but one performance. Having received an agreed satisfaction of that performance by the principal, he cannot seek double performance from the surety as well. *Cf.*, *Reid* v. *Kier*, 175 Or. 192, 211-12, 152 P.2d 417, 424-25 (1944); *Hanson* v. *Bellman*, 161 Or. 373, 384-85, 88 P.2d 295, 300 (1939).

3. *An intent not to release the surety is not effective to prevent the surety's discharge unless the reservation is contained in the instrument of release.*

In its affidavit the Association contended that the sole reason for its release of PSG and Greenberg was the fact of their insolvency (R. 130-31). Thus, even though it did not reserve its rights against the Bank in the release or the Stipulation of Dismissal, the Association contends that it did not intend to release the Bank.

Even assuming the accuracy of these contentions, the Association's mental reservation did not preserve its rights against the Bank. "The reservation of right is ineffective unless it is contained in the instrument of release." Simpson, Suretyship 304 (1950); accord, Restatement, Security § 122(b) (1941).

In *Bafico* v. *Southern Pacific Co.*, 364 F.2d 36 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025, 87 Sup. Ct. 743, 17 L. Ed. 2d 673 (1967), this Court stated the Oregon law with respect to uncommunicated mental reservations:

> "* * * Here appellant was represented at all times, including the negotiation for settlement and signing of the release, by his own attorney, not by a layman. We think that in these circumstances, the trial court could properly infer that appellant knew what he was doing when he signed the release and could properly hold him bound by the literal, precise, unambiguous terms of the contract he signed. It follows that no investigation into his uncommunicated intent at the time of signing was required, for 'the law in this jurisdiction [Oregon] does not permit contracts to be reformed merely because of uncommunicated mental reservations held by one of the parties at the time of execution.' Wheeler v. White Rock Bottling Co., 1961, 229 Ore. 360, 366 P.2d 527, 529." 364 F.2d at 38.

The case of *Gunnell Construction Co., Inc. v. Hartford Accident and Indemnity Company*, 374 F.2d 278 (D.C. Cir. 1966), involved three parties, a prime contractor, a subcontractor, and the sub-contractor's sur-

ety. When the subcontractor failed to complete the work under the subcontract, a dispute arose as to whether the prime contractor or the subcontractor was in breach. The subcontractor filed an action against the contractor in the District Court for the District of Columbia; the contractor answered, claiming that it was the subcontractor who breached the contract. Meanwhile, the subcontractor filed a petition in bankruptcy; the contractor filed claims against the bankrupt estate based upon the alleged breach of contract and other matters.

The bankrupt estate of the subcontractor reached a compromise with the contractor in which the compromise agreement expressly reserved the contractor's rights against the subcontractor's surety. The contractor and subcontractor then filed a stipulation of dismissal in the district court action dismissing all claims, setoffs and counterclaims, but not expressly reserving the contractor's rights against the surety.

When the contractor brought action against the subcontractor's surety, the district court granted summary judgment against the contractor. The D. C. Circuit affirmed, holding that despite the reservation of rights in the compromise agreement, the stipulation of dismissal without reservation discharged the surety. The dissenting judge was of the opinion that the surety was not discharged because of the express reservation of rights in the compromise agreement.

In the present case, the Association not only failed to reserve its rights against the Bank in the Stipula-

tion of Dismissal, but also failed to reserve its rights in the instrument of release.

B. The mutual release constituted an agreed satisfaction of PSG's underlying liability for the purchase price of the GARDENIA sugar and must be taken in mitigation of the Association's damages on the breach of the letter of credit.

Even if the parties were not in a suretyship relation, the Bank's obligation to the Association has been satisfied by the Association's mitigation of its damages. The Association is entitled to but one payment for the GARDENIA sugar. Having reached an accord and satisfaction with PSG and Greenberg for the purchase price of the sugar, the Association by this satisfaction has received payment for the sugar and may not have an additional satisfaction from the Bank.

Since the Association is entitled to be paid only once for its sugar, it follows that anything the Association realizes from the sale or disposition of the sugar, even if from a third party, mitigates the Association's damages from the Bank's failure to honor the letter of credit. ORS 75.1150(1) provides:

> **"Remedy for improper dishonor or anticipatory repudiation.** (1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller as provided in ORS 72.7070 and may recover from the issuer the face amount of the draft or demand together with incidental damages under ORS 72.7100 on seller's incidental damages and interest *but less any*

> *amount realized by resale or other use or disposition of the subject matter of the transaction.* In the event no resale or other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment of judgment." (Emphasis added)

In *Maurice O'Meara Co.* v. *National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925), the court stated with respect to a bank's wrongful refusal to make payment under a letter of credit covering a shipment of paper:

> "The plaintiff's damages were, primarily, the face amount of the drafts. Plaintiff, of course, was bound to minimize such damage so far as it reasonably could. This it undertook to do by reselling the paper, and for the amount received, less expenses connected with the sale, it was bound to give the defendant credit." 146 N.E. at 640; accord, 6 Michie, Banks and Banking 393 (1952).

The Association has disposed of the sugar. PSG received the GARDENIA sugar from the Association and resold it to a New York buyer. Prior to executing the release, PSG had admitted that it owed the Association $244,730.32 for the sugar, but had been withholding payment to offset PSG's other claims against the Association (R. 62-63; R. 74, par. 15; R. 77, par. 4).

The Association, however, has now released PSG from its admitted liability to pay for the GARDENIA

sugar. In return for being relieved of paying the Association for the sugar and for being released from the other claims the Association had asserted against them, PSG and Greenberg released the Association from their counterclaims totalling $1,265,423.

The Association's claim that PSG and Greenberg were insolvent at the time the release was signed, that PSG and Greenberg made no payment to the Association for the release, and that the only incentive for the Association's giving the release was the saving of costs of litigation (R. 130-31), is untenable. Prior to signing the release, PSG's and Greenberg's assets included over $1,200,000 in claims against the Association. These claims were a potential source from which they could have paid the Association (by way of setoff) the remainder of the purchase price of the GARDENIA sugar; or if the Bank paid the Association under the letter of credit, these claims could have provided PSG and Greenberg with the funds with which to reimburse the Bank. Instead, the Association took these claims as an agreed satisfaction of the Association's claims against PSG and Greenberg, including the claim for the purchase price of the sugar.

In *Hanson* v. *Bellman*, 161 Or. 373, 88 P.2d 295 (1939), plaintiff's predecessor had a claim against a bank as his escrow agent for the wrongful delivery of a deed and a claim against the holder of the deed in order to cancel it. He filed an action against the bank, but took a voluntary nonsuit. He then reached an accord and satisfaction with the bank in which he gave

the bank a full release and the bank released him from the judgment against him for costs. When the plaintiff brought suit for cancellation of the deed, the court held:

> "The record shows without question that about eighteen months after these transactions, after Knerr's election to recover from his delinquent agent, the bank, he had a settlement with the bank and reached an accord and satisfaction and gave the bank a release of all claim. He thus, with full knowledge of the facts and with the express approval of the attorney, the present plaintiff received and accepted a full satisfaction for the alleged injury done him. Having done so, he is precluded from recovering the property for which he has been paid by this satisfaction and is precluded from recovering from these defendants." 161 Or. at 384, 88 P.2d at 300.

In *Reid* v. *Kier*, 175 Or. 192, 152 P.2d 417 (1944), a creditor beneficiary had a right to maintain an action against both the promisor and the promisee of a third party beneficiary contract, but was entitled to but a single satisfaction. The beneficiary executed a release in favor of the promisor and then brought action against the promisee. The court held that since there could be but one satisfaction, the release of the promisor discharged the promisee. 175 Or. at 211-12, 152 P.2d at 424-25.

In *Perry* v. *Oliver*, 317 Mass. 538, 59 N.E.2d 192 (1945) a person made a loan to a husband and wife, and later filed an action against the husband and wife

to recover the amount of the loan. While the action was pending, the wife gave the creditor a note and mortgage to secure the loan. The husband filed a declaration in setoff alleging that the creditor owed him money. Without the wife's knowledge, the creditor and the husband agreed to extinguish the claims they had against each other. The creditor then took steps to foreclose the wife's mortgage. In cancelling the mortgage, the court stated:

> "The reason for this rule is plain. Although there are several obligors there is but one debt; therefore the satisfaction of the debt, or of a judgment against one for it, necessarily discharges all." 59 N.E.2d at 193.

The Association has received full satisfaction for the purchase price of the sugar. The Bank is entitled to apply that satisfaction in mitigation of the damages claimed by the Association.

II

The finding that the August 26, 1966 cable was a misrepresentation voiding the Association's reduction of its first draft cannot be sustained since the sugar at all times polarized below the minimum fixed in the letter of credit.

The factual context in which the August 26, 1966 cable was sent is clearly set forth in the record and has been described earlier in this brief in the Statement of the Case. In summary, the cable in controversy was an outgrowth of negotiations between the Association and Greenberg after initial polarization tests disclosed that the GARDENIA sugar was polarizing

as much as 2.7° below the 96° minimum fixed in the letter of credit. The Association was first informed by cable that initial polarization tests of the GARDENIA sugar were running between 93° and 95° (Tr. 207, 208). Greenberg discussed the test results with the Association's manager by telephone on August 26, 1966, and advised the manager that his buyer sought substantial adjustments in purchase price to compensate for deficiencies in the sugar (Tr. 207-209).

On the same day, Greenberg informed the Bank that the Association had agreed to reduction of its first draft to 75 percent of invoice value and requested that the Bank cable Banco del Agro, the Association's bank in Guatemala, in order to obtain confirmation of the proposed reduction by the Association and by its bank (Tr. 84, 95, 96). The cable stated:

> "174 REFERENCE OUR LETTER CREDIT 11561 POLARIZATION BELOW CREDIT REQUIREMENT ASAZGUA [the Association] WILL AUTHORIZE DRAFT COVERING 2917 LONG TONS AT 75 PERCENT INVOICE VALUE PLEASE OBTAIN THEIR APPROVAL AND CABLE US URGENTLY TODAY NECESSARY AUTHORITY TO ALTER DRAFT TO 75 PERCENT INVOICE VALUE ADVISE US CORRECTED DRAFT AMOUNT.
>
> UNITBANK." (Ex. 54).

The cable was received in Guatemala on Saturday, August 27, and a representative of Banco del Agro delivered a copy to the president of the Association, who approved reduction of the draft to 75 percent

of invoice value (Tr. 239). By cable dated August 28, 1966, and by letter dated August 31, 1966, Banco del Agro confirmed to the Bank on behalf of the Association the reduction of the first draft (Exs. 212, 58).

The sole basis assigned by the trial court for the liability of the Bank upon the first draft lies in its finding that the cable of August 26, 1966 misrepresented the quality of the GARDENIA sugar to the Association, thereby vitiating the Association's consent to the reduction of the first draft.

For purposes of this appeal the Bank will accept the court's finding that the August 26 cable was a material representation as to the quality of the GARDENIA sugar and that the Association relied upon that representation in authorizing the reduction of the first draft to 75 percent of invoice value. The Bank cannot, however, accept, nor can it find any support for the court's finding that the representation contained in that cable was false and constituted a misrepresentation.

The only representation in the cable is "POLARIZATION BELOW CREDIT REQUIREMENT." In terms of the language of the cable, the applicable law, and the interchangeable usage of "credit" and "letter of credit" by the parties, that statement can only refer to the 96° minimum polarization set forth in letter of credit No. 11561. "Credit" and "letter of credit" are identically defined under ORS 75.1030(a) (UCC 5-103) and are used interchangeably throughout that chapter. The identity of meaning of the two

terms as established under applicable law becomes a part of the parties' contract as if set forth therein. *Giustina* v. *United States*, 190 F. Supp. 303 (D. Or. 1960); *United States Fidelity & Guaranty Company* v. *Long*, 214 F. Supp. 307 (D. Or. 1963). A review of letter of credit 11561 and the Uniform Customs and Practice for Documentary Credits incorporated therein discloses that the two terms are used interchangeably throughout those documents (Exs. 201, 203).

The cable itself first identifies the letter of credit by number and only then represents that the polarization is below the "credit requirement." Finally, the Association stipulated in the Pretrial Order herein that the August 26th cable reported that "sugar polarization was below credit requirements of letter of credit No. 11561." (R. 73, par. 11). In view of the parties' agreement that the cable reference to "credit requirement" was a reference to letter of credit 11561, the only applicable standard by which to judge the truth of that cable is the 96° minimum polarization standard of that credit.

Obviously a statement, in order to constitute a misrepresentation enabling a party to avoid his contractual obligations, must be not only material and relied upon, but also false. While authorities may vary as to the degree of reliance and materiality required, untruth of the statement in question is basic to the definition of misrepresentation and to relief therefor. The Restatement of Contracts defines misrepresentation in the following terms:

> "Misrepresentation * * * means any manifestation by words or other conduct by one person to another that, under the circumstances, *amounts to an assertion not in accordance with the facts.*" (Emphasis supplied.) Restatement, Contracts § 470 at 890, 891 (1932).

Since by agreement of the parties the cable represented that the sugar polarized below the standard of letter of credit 11561, the truth or falsity of that cable and validity of the court's finding of misrepresentation must be judged in terms of the 96° standard fixed by the credit.

Although the Bank, prior to sending its cable, did not have independent confirmation of Greenberg's representations regarding the polarization of the sugar, those representations were confirmed by the test results issued by the Lewis Loper Waldo Laboratory on the day of the cable. The first five test samples of the GARDENIA sugar polarized respectively at 93.3, 93.9, 95.6, 95.4 and 95.7 degrees (Ex. 224). In all, some 14 samples were taken of the GARDENIA sugar as it was unloaded at approximately 700,000 lb. intervals. Those 14 samples were tested by three separate laboratories, with the test samples varying from 93.25° polarization to 96.3° polarization. Only one of the 14 samples tested at or above the 96° level fixed in the credit, and the average polarization of the GARDENIA sugar was 95.176358°. (Test results collected in Ex. 23.)

Unfortunately, the trial court did not specify the

standard against which it judged the cable to be a misrepresentation. It is evident, however, in the light of the facts, that the court used some standard other than 96°. The Association's manager testified that he believed that the cable meant that the sugar was polarizing below 94°, and the court may have adopted that belief as its standard. There is nothing, however, in the cable, the letter of credit, or the parties' usage of the term "credit requirement" which would support that construction. Reference to a standard of 94° is particularly anomolous in view of the parties' specific pretrial agreement that the cable reported polarization below the requirements of letter of credit 11561. Since the only polarization standard specified in the credit was 96° and since the sugar never, in fact, polarized at that level, there can be no basis for the court's finding that the statement "polarization below credit requirement" was false.

While the Association may have mistakenly interpreted the cable upon receipt and acted on the basis of that mistake, such mistake cannot form a basis for the court's finding of a misrepresentation on the part of the Bank. There is nothing in the record to indicate that the Bank knew that the Association might misconstrue its cable advice. The Bank's representations were limited in scope to the requirement set forth in its letter of credit and phrased in language which could only refer to the standard in its credit. Having received payment on its reduced draft, the Association cannot now seek additional payment on the ground that it was mistaken in consenting to the reduction.

CONCLUSION

The defendant Bank respectfully urges that the trial court erred in denying defendant's post-trial motion. The judgment should be reversed and the case remanded with the direction that the trial court either amend its findings and judgment to show that plaintiff has suffered no damage, or relieve defendant from the judgment on the ground that the judgment has been satisfied, released or discharged. In the event this court should determine that the post-trial motion was properly denied, defendant respectfully urges that the trial court erred in finding that defendant induced plaintiff to consent to the reduction of the first draft through misrepresentation. Accordingly, the judgment should be reversed and remanded with the direction that the trial court reduce the judgment by the difference between 90 percent and 75 percent of invoice value on the first draft—that is, the judgment should be reduced by $55,866.38, and the interest which was assessed thereon.

Respectfully submitted,

CLARENCE R. WICKS
HOWARD M. FEUERSTEIN
ROBERT D. GEDDES
DAVIES, BIGGS, STRAYER, STOEL AND BOLEY
1410 Yeon Building
Portland, Oregon 97204
Attorneys for Appellant
United States National Bank of Oregon, Portland, Oregon

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD M. FEUERSTEIN
Of Attorneys for Appellant

APPENDIX A

Page references to the record where exhibits were identified, offered and received are as follows:

Exhibit Number	Identified	Offered and Received
Plaintiff's		
1-103	58	58
104	180	180
Defendant's		
201-234	58	58
236	199	200
237	197	197
238	199	200

APPENDIX B

FULL AND FINAL RELEASE OF ALL CLAIMS

WHEREAS Asociacion de Azucareros de Guatemala has instituted action in the United States District Court for the District of Oregon entitled "Asociacion de Azucareros de Guatemala, 4a. Av. 14-53 (1), Guatemala City, Guatemala, Plaintiff, v. Philip S. Greenberg, 607 Executive Building, Portland, Oregon 97204, PSG Co., 607 Executive Building, Portland, Oregon 97204, The United States National Bank of Oregon, Portland, Oregon, Defendants," Clerk's No. 66-580, wherein said Asociacion de Azucareros de Guatemala claims certain payments on shipments, agency commissions, lost profits and other damages from said PSG Co. and Philip S. Greenberg, and

WHEREAS PSG Co., in said action, has asserted counterclaims against the Asociacion de Azucareros de Guatemala for damages resulting from alleged breach of certain contracts,

NOW, THEREFORE, in consideration of the mutual agreements herein contained, Asociacion de Azucareros de Guatemala releases and discharges PSG Co. and Philip S. Greenberg, and Philip S. Greenberg and PSG Co. release and discharge Asociacion de Azucareros de Guatemala, its members, except El Salto, S.A., its officers and employees of and from any and all claims, demands, actions or causes of action whatsoever, of any kind or nature, known or unknown, suspected or unsuspected, which the undersigned, or any of them, may have at the date hereof.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed this —— day of ————————, 1967.

ASOCIACION de AZUCAREROS de GUATEMALA
By J. C. BELLAMY
John C. Bellamy, Manager
PSG CO.
By PHILIP S. GREENBERG
Philip S. Greenberg, President
PHILIP S. GREENBERG
Philip S. Greenberg

APPENDIX C

APPLICABLE PROVISIONS OF FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings By The Court.

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. * * *"

Rule 59. New Trials; Amendment Of Judgments

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

* * * * *

"(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment."

Rule 60. Relief from Judgment Or Order

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *"